

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ,

Petitioner,

v.

M. MARTEL, Warden,

Respondent.

Civil No. 08cv0816-JLS (CAB)

**REPORT AND RECOMMENDATION TO  
DENY PETITION FOR WRIT OF  
HABEAS CORPUS**

Alberto Fernandez, a state prisoner proceeding *pro se*, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, raising two grounds for relief. The Court has considered the Petition, Respondent's Answer and Memorandum of Points and Authorities, and all supporting documents submitted by the parties. Based upon the documents and evidence presented in this case, and for the reasons set forth below, the Court **RECOMMENDS** that the Petition be **DENIED** and the case be **DISMISSED WITH PREJUDICE**.

**I. FACTUAL BACKGROUND**

This Court gives deference to state court findings of fact and presumes them to be correct; Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Parke v. Baley*, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from such facts, are entitled to statutory presumption of correctness). Because Petitioner has not attempted to rebut the factual findings made by the state court, the following facts are taken from the California Court of Appeal opinion in *People v. Fernandez*, No.

1 D048685, slip op. (Cal. Ct. App. June 21, 2007):

2 This case involves Fernandez's ongoing sexual abuse of his daughter E. from  
3 September 2000 to June 2004 when E. was between the ages of 10 and 14.

4 E.'s testimony revealed that the sexual abuse commenced during a time period  
5 when her mother was employed outside the home and Fernandez was no longer employed  
6 because of a work-related injury. Typically, the sexual assaults would occur during the  
7 afternoon after school when Fernandez would arrange to be alone with E. by sending E.'s  
8 brother to the store. In later years, the sexual abuse occurred at night when the other  
9 family members were sleeping. During many of the incidents, Fernandez's pattern of  
10 behavior was to touch E.'s breasts, have sexual intercourse with her, ejaculate into a  
11 tissue, and threaten to hurt the family if she reported the assaults.

12 The first assault occurred when the family lived in a home on Logan Avenue and  
13 E. was 10 years old. Fernandez touched E.'s breasts over her clothes while they were in  
14 the kitchen, and then took her to the bedroom where he removed her clothes and had  
15 sexual intercourse with her. About two months later, Fernandez touched her breasts  
16 while she was in the bathroom, and then took her to the bedroom and had sexual  
17 intercourse with her. E. estimated that Fernandez had sexual intercourse with her on two  
18 other occasions while they were living on Logan Avenue.

19 Fernandez continued the molestation when the family moved to their first home  
20 on Valle Avenue (Valle 1). When E. was in the sixth grade, he had sexual intercourse  
21 with her on the floor in the bedroom she shared with her brother while her brother was at  
22 the store. On two other occasions, he had sexual intercourse with her in the bathroom and  
23 in his bedroom.

24 E. also described an incident at Valle 1 when Fernandez asked E.'s mother to  
25 bring his socks into the bathroom. Her mother told E. to bring the socks, and when E. did  
26 so, Fernandez locked the bathroom door and had sexual intercourse with E. Fernandez  
27 instructed E. to tell her mother that she had stayed in the bathroom because she was  
28 "peeing." Fernandez also engaged in anal intercourse with E. on one occasion in the  
bathroom at Valle 1 when no one else was at home.

Fernandez also molested E. at their second home on Valle Avenue (Valle 2),  
when she was about 13 or 14 years old. At this residence, E. had her own bedroom  
upstairs while her parents' bedroom was downstairs. When her mother and brother were  
asleep at night, Fernandez came upstairs to E.'s bedroom, put his mouth on her breast,  
and had sexual intercourse with her on the floor. He told her not to make noise because  
she would wake up her brother. Fernandez repeated this conduct on several other  
occasions.

Apart from the sexual intercourse, on various occasions while living at Valle 2  
Fernandez touched E.'s breasts and grabbed her buttocks. When she was in about the  
eighth grade, he touched her breasts and buttocks while she was in her bedroom in the  
afternoon. When she was in about the ninth grade, he touched her breasts while she was  
in the living room.<sup>1</sup>

In addition to the sexual abuse directed at E., Fernandez physically abused E., her  
mother, and her brother. In March and April 2004, E. was hospitalized after she

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<sup>1</sup> On cross-examination, E.'s description of the order and location of the sexual assaults  
occurring over the years was somewhat different than her description on direct examination. E.  
explained that she had trouble remembering the incidents in order.

1 attempted suicide. On June 4, 2004, Fernandez had a therapy session with a psychiatrist  
 2 who had been treating him for psychological problems associated with his work-related  
 3 injury. On June 7, 2004, Fernandez unexpectedly called the psychiatrist and told him that  
 4 “there was more to say, that he hadn’t dared to say before.” Fernandez, sounding worried  
 5 and ashamed, told the psychiatrist that about two and one-half years earlier he had  
 6 “touched [E.] all over.” When queried by the psychiatrist, Fernandez admitted that he  
 7 had touched parts of her body (for example, her legs), but denied having sex. The  
 8 psychiatrist interpreted Fernandez’s statements to mean that he had touched her body with  
 9 his hands for sexual satisfaction, and reported the information to Child Protective  
 10 Services (CPS).

11 A medical examination of E.’s vaginal and anal areas in July 2004 showed normal  
 12 results with no sign of injury. According to a defense expert, her hymen (tissue at the  
 13 vaginal opening) was intact. Testifying for the prosecution, Dr. Emma Raizman stated  
 14 that the genital and anal areas of children and adolescents usually appeared normal  
 15 regardless of reported sexual abuse history. She explained that physical signs of sexual  
 16 abuse are rare because injuries to these areas heal quickly; the anus can expand to fit  
 17 “rather large bowel movements” without any injury; and when a child reaches puberty the  
 18 hymen becomes “redundant” (i.e., folded in on itself, thickened, and stretchy) which  
 19 allows penetration without injury. Dr. Raizman testified that the concept that a “broken”  
 20 hymen meant loss of virginity was a misconception because the hymen “almost always  
 21 has some kind of opening in it” and it is not a “solid piece of tissue that’s popped or  
 22 broken with first intercourse.”

23 E. told Dr. Raizman that she started menstruating when she was 10 years old,  
 24 which indicated that she had an “estrogenized hymen” at the time the abuse began and  
 25 made it less likely there would be signs of injury to that area. When Dr. Raizman  
 26 examined E.’s hymen, she observed that it was well estrogenized, stretchy, and  
 27 redundant. She acknowledged that a broken hymen cannot actually grow back, but  
 28 opined that a torn hymen can fully heal and further a hymen can remain intact even with  
 ongoing vaginal intercourse.

Disagreeing with Dr. Raizman, Dr. Leeland Lapp testified for the defense that the  
 hymen is not designed to stretch; that estrogenation impacts the elasticity of the vagina  
 but not the hymen; and that a normal-size penis could not enter a vagina without breaking  
 the hymen. Dr. Lapp examined Fernandez and determined his penis was of normal size.  
 Dr. Lapp opined that Fernandez’s penis could not have entered E.’s vagina without  
 breaking the hymen.

Persuaded by the prosecution’s evidence, the jury convicted Fernandez of the  
 charged sexual offenses.

(Lodgment 22, at 2-5.)

## II. PROCEDURAL BACKGROUND

On February 9, 2006, a jury found Petitioner guilty of three counts of aggravated sexual assault  
 on a child (Cal. Penal Code § 269), six counts of committing a forcible lewd act upon a child (Cal. Penal  
 Code § 288(b)(1)), and one count of committing a lewd act upon a child 14 or 15 years old (Cal. Penal  
 Code § 288(c)(1). (Lodgment 1, Clerk’s Transcript, at 104-13, 236-38.) On May 19, 2006, the trial  
 court sentenced Petitioner to 15 years to life, plus eight years and eight months in prison. (*Id.* at 185-89,

244-45.) On December 12, 2006, Petitioner appealed his conviction to the California Court of Appeal. (Lodgment 19.) The state appellate court affirmed the judgment on June 21, 2007. (Lodgment 22.) On July 13, 2007, Petitioner filed a petition for review in the California Supreme Court. (Lodgment 23.) The petition for review was denied on August 31, 2007. (Lodgment 24.)

On February 15, 2008, Petitioner filed the instant Petition for Writ of Habeas Corpus in the Eastern District of California. [Doc. No. 1, at 7-18.] On April 30, 2008, the case was transferred to this Court, because the conviction was entered by the San Diego County Superior Court, and witnesses and evidence necessary for the resolution of the Petition are more readily available in the Southern District. [Id. at 2-3.] On July 11, 2008, Respondent filed an answer to the Petition. [Doc. No. 4.] If Petitioner wished to file a Traverse, he was to do so on or before September 15, 2008. [See Doc. No. 7.] To date, Petitioner has not filed a Traverse.

### III. DISCUSSION

#### A. Scope of Review

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody *in violation of the Constitution or laws or treaties of the United States*.

28 U.S.C. § 2254(a) (emphasis added).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) applies to habeas corpus petitions filed after 1996. *Lindh v. Murphy*, 521 U.S. 320 (1997). As amended, 28 U.S.C. § 2254(d) reads:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceeding.

1 28 U.S.C.A. § 2254(d).

2 To obtain federal habeas relief, Petitioner must satisfy either § 2254(d)(1) or § 2254(d)(2).  
3 *Williams v. Taylor*, 529 U.S. 362, 403 (2000). The Supreme Court interprets § 2254(d)(1) as follows:

4 Under the “contrary to” clause, a federal habeas court may grant the writ if the state court  
5 arrives at a conclusion opposite to that reached by this Court on a question of law or if the  
6 state court decided a case differently than this Court has on a set of materially  
7 indistinguishable facts. Under the “unreasonable application” clause, a federal habeas  
8 court may grant the writ if the state court identifies the correct governing legal principle  
9 from this Court’s decisions but unreasonably applies that principle to the facts of the  
10 prisoner’s case.

11 *Williams*, 529 U.S. at 412-13; *see Lockyer v. Andrade*, 538 U.S. 63, 73-74 (2003).

12 Where there is no reasoned decision from the state’s highest court, this Court “looks through” to  
13 the underlying appellate court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). If the  
14 dispositive state court order does not “furnish a basis for its reasoning,” federal habeas courts must  
15 conduct an independent review of the record “to determine whether the state court clearly erred in its  
16 application of controlling federal law.” *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Delgado*  
17 *v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Lockyer*, 538 U.S. at 75-76).  
18 However, a state court need not cite U.S. Supreme Court precedent when resolving a habeas corpus  
19 claim. *Early v. Packer*, 537 U.S. 3, 8 (2002). As long as neither the reasoning nor the result of the state-  
20 court decision contradicts U.S. Supreme Court precedent, the state court decision will not be “contrary  
21 to” clearly established federal law. *Id.*

## 22 **B. Analysis**

23 Petitioner argues in his federal Petition that he was denied his due process rights by: 1) the  
24 erroneous admission of evidence of alleged prior sexual assaults of his wife and sister-in-law; and 2) the  
25 trial court’s partial exclusion of the testimony of defense expert, Dr. Constance Dalenberg. (Pet. 13-  
26 18.)<sup>2</sup> Respondent argues: 1) admission of evidence of uncharged sexual assaults did not violate due  
27 process, because permissible inferences could be drawn from the evidence; and 2) the partial exclusion  
28 of the defense expert’s testimony did not violate due process, because the evidence was inadmissible.  
(Mem. P. & A. in Supp. of Answer 6, 14.) Respondent also argues the state court’s denial of Petitioner’s  
claims was neither contrary to, nor an unreasonable application of, clearly established U.S. Supreme

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<sup>2</sup> Citations to the Petition refer to Doc. No. 1 and the page numbers assigned by CM/ECF.

1 Court law.

2 **1. Claim One**

3 Claim one of the Petition alleges a violation of Petitioner's due process right, because the trial  
4 court allowed evidence that Petitioner began a relationship with his wife when she was 13 years old (and  
5 Petitioner was 21 years old) and evidence that Petitioner sexually assaulted his wife's sister when she  
6 was 12 years old and again when she was 14-15 years old. (Pet. 13-15.) The last reasoned state court  
7 opinion that addresses this claim is the state appellate court decision of June 21, 2007, affirming the  
8 judgment of the state superior court. (Lodgment 22.) That court found that the evidence was admissible  
9 under California Evidence Code § 1108 and the trial court did not abuse its discretion in admitting the  
10 evidence. (*Id.* at 10-13.)

11 To the extent Petitioner raises only state evidentiary claims in his argument, these issues must be  
12 rejected as not cognizable in federal habeas corpus proceedings. Absent some constitutional violation, a  
13 violation of state law does not provide a basis for federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62,  
14 67-68 (1991). The U.S. Supreme Court has left open the question of whether admission of propensity  
15 evidence violates due process. *Id.* at 75 n.5. Because the Supreme Court has reserved this issue as an  
16 "open question," the Ninth Circuit has held that a petitioner's due process right concerning the  
17 admission of propensity evidence is not clearly established for purposes of review under AEDPA.  
18 *Alberni v. McDaniel*, 458 F.3d 860, 866-67 (9th Cir. 2006); *see also Bugh v. Mitchell*, 329 F.3d 496,  
19 512-13 (6th Cir. 2003) (state court decision allowing admission of evidence pertaining to petitioner's  
20 alleged prior, uncharged acts of child molestation was not contrary to clearly established Supreme Court  
21 precedent because there was no such precedent holding that state violated due process by permitting  
22 propensity evidence in the form of other bad acts evidence).

23 Even if this were not propensity evidence, the claim would nevertheless be without merit.  
24 Erroneous state evidentiary rulings implicate the federal Constitution only if the admission of the  
25 evidence violated the petitioner's due process right to a fair trial. *Estelle*, 502 U.S. at 68-70. In order to  
26 prevail, Petitioner must show that the trial court's ruling was so prejudicial that it rendered his trial  
27 fundamentally unfair. *Id.* In evaluating the prejudicial effect of constitutional error on collateral review,  
28 a federal court must determine whether the error had "substantial and injurious effect or influence in



determining the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (citation omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (citation omitted). "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). Here, there were rational and permissible inferences the jury could draw from the challenged evidence.

**a. Testimony of Petitioner's sister-in-law**

Prior to trial, the prosecutor moved to admit evidence of two uncharged sexual offenses involving Petitioner's sister-in-law M. that occurred when M. was sleeping at the home that Petitioner and his wife shared. (Lodgment 4, Reporter's Appeal Transcript, vol. 3.) According to the prosecutor's offer of proof, the first offense occurred when M. was about 12 or 13 years old and the second offense occurred when M. was about 14 or 15 years old. (*Id.* at 105.) During the first incident, M. was sleeping in bed next to A. (Petitioner's wife) when Petitioner came home, got into bed and began rubbing his body against M.'s body. M. immediately got up and woke A. Petitioner claimed he thought M. was A. The second offense occurred when Petitioner touched M.'s breasts and stomach over her clothes while she was sleeping on the couch. When M. screamed and A. turned on the light, Petitioner claimed he was looking for the door to the bathroom. (*Id.*)

Defense counsel argued the evidence regarding M. was remote, irrelevant, and prejudicial. (*Id.* at 102-03.) Arguing against remoteness, the prosecutor noted that the charged offenses began in 2000, which made the 1994 incident with M. just six years before the first charged incidents with E. (*Id.* at 104.) Further, the prosecutor asserted the uncharged incidents with M. were not too remote when considering that the uncharged and charged incidents both involved sexual conduct with girls in the same age range. (*Id.*)

The trial court found the uncharged offenses with M. were similar because: 1) they involved a female victim in the same age range as E. and could be viewed as involving an attempt to have sexual relations; 2) the uncharged offenses were not more inflammatory than the charged offenses; and 3) there was no danger of confusion or undue consumption of time. (*Id.* at 106.) Further, the court concluded the incidents with M. were not too remote, noting that uncharged sexual offense evidence (Cal. Evid. Code § 1108) was not subject to the 10-year time limitation generally applicable to uncharged domestic

1 violence evidence (Cal. Evid. Code § 1109(e)), and that the multiple sexual molestation incidents were  
2 highly relevant to show propensity. (*Id.* at 106-07.)

3 After M. testified at trial, Petitioner's attorney moved for a mistrial on the basis that M.'s  
4 testimony revealed the uncharged sexual offenses were even more remote than believed during the *in*  
5 *limine* hearing. (Lodgment 7, at 488.) According to Petitioner's attorney, it appeared that the incidents  
6 occurred 18 years prior, rather than 13-15 years prior as originally thought. (*Id.*) The trial court rejected  
7 the assertion that remoteness required exclusion of the evidence and denied the mistrial motion. (*Id.* at  
8 489.) The court noted that it was not looking at the time between the alleged offense to the time of trial.  
9 Rather, it was looking at the time between alleged offenses, which was much less than 18 years. (*Id.*)

10 The admission of the challenged evidence was not so prejudicial that it rendered Petitioner's trial  
11 fundamentally unfair. *Estelle*, 502 U.S. at 68-70. The evidence was relevant and probative on issues  
12 central to the case. Moreover, Petitioner has not demonstrated that the evidence had a substantial and  
13 injurious effect on the jury verdict. Petitioner does little more than recite what took place at trial and  
14 provides little evidence for his argument that the trial court committed error in allowing M.'s testimony.  
15 To the extent that this claim states a claim for federal habeas relief, admission of the evidence did not  
16 render Petitioner's trial fundamentally unfair in violation of his due process rights.

17 **b. Testimony of Petitioner's wife**

18 As it relates to the testimony of Petitioner's wife A., during the *in limine* hearing, the prosecutor  
19 requested permission to present evidence of Petitioner's sexual relationship with his wife A. when A.  
20 was about 13 years old. (Lodgment 4, at 93.) The prosecutor explained that Petitioner married A. when  
21 she was about 13 years old and he was about 21 years old, and that evidence of their early sexual  
22 relationship was relevant to show Petitioner's propensity to be sexually attracted to girls in their early  
23 teens. (*Id.* at 93-94.) Defense counsel stated that if the prosecutor was allowed to present this evidence,  
24 the defense would present evidence that A.'s parents approved of the marriage and expert testimony that  
25 marriage between a young girl and an older man was not unusual in Mexican culture. (*Id.* at 95.)

26 At the *in limine* hearing, the trial court ruled the prosecutor could not present the evidence in its  
27 case-in-chief, finding that it would result in a "mini-trial within a trial" and consume too much time, but  
28 left open the possibility that the evidence might become admissible on rebuttal. (*Id.* at 96-97, 99-100.)



1 Thereafter, at trial during cross-examination of A., defense counsel asked if Petitioner had ever raped A.  
2 (Lodgment 5, at 278.) When the prosecutor objected on relevancy grounds, defense counsel made an  
3 offer of proof that evidence of recent incidents where Petitioner had raped and sodomized his wife were  
4 relevant to show A.'s motive to retaliate against her husband. (*Id.* at 281.) After briefing from defense  
5 counsel and additional discussion, the court gave defense counsel permission to question A. about  
6 Petitioner's conduct of raping and sodomizing her in the latter years of their marriage. (Lodgment 6, at  
7 294-96.)

8 Based on its ruling admitting the testimony proffered by the defense, the trial court changed its  
9 earlier ruling excluding the prosecution's evidence about Petitioner's sexual relationship with A. when  
10 she was about 13 years old. (*Id.* at 296-97.) The court reasoned the defense evidence about recent rape  
11 and sodomy was more inflammatory than the prosecution evidence about the early sexual relationship,  
12 and given its ruling allowing admission of the defense evidence, the prosecutor should be allowed to  
13 question A. about her entire sexual relationship with Petitioner. (*Id.*) Thereafter, A. testified that she  
14 met Fernandez in California when she was 12 or 13 years old and he was 20 years old. (*Id.* at 399-400,  
15 404.) During the month of December, when A. was about 13 or 14 years old, she ran away from her  
16 mother's home in California and went to Mexico with Petitioner to get married. (*Id.* at 406-07.) When  
17 A. was in Mexico, her mother provided a letter giving permission for her to get married. (*Id.* at 401)  
18 Petitioner and A. first had sexual intercourse at a hotel in California on their way to Mexico. (*Id.* at 400-  
19 01.) They were married in July 1988 when A. was 14 years old. (*Id.* at 405.)

20 Petitioner argues by allowing such testimony, the trial court denied him due process. (Pet. 13.)  
21 However, he fails to provide any support for his contention. The admission of the challenged evidence  
22 was not so prejudicial that it rendered Petitioner's trial fundamentally unfair. *Estelle*, 502 U.S. at 68-70.  
23 In fact, much of the information about the history between A. and Petitioner was elicited by Petitioner's  
24 trial counsel, as part of her defense strategy. The record indicates that she wanted to elicit the  
25 information about Petitioner having raped and sodomized A. to show that A had a motive to retaliate  
26 against Petitioner. In addition, defense counsel was the one to first ask A. how old she was when she  
27 met Petitioner and when they first had sexual intercourse to establish that it was common in Mexican  
28 culture for the husband to be several years older than the wife. (Lodgment 6, at 402.) The trial court

1 only allowed the testimony about when they first had sexual intercourse, because defense counsel had  
2 questioned A. about the rape and sodomy.

3       Petitioner has not demonstrated that the evidence had a substantial and injurious effect on the  
4 jury verdict. To the extent that this claim states a claim for federal habeas relief, admission of the  
5 evidence did not render Petitioner's trial fundamentally unfair in violation of his due process rights. For  
6 the foregoing reasons, the state court's denial of claim one was neither contrary to, nor an unreasonable  
7 application of, clearly established U.S. Supreme Court law. As such, this Court **RECOMMENDS** that  
8 this claim be **DENIED**.

## 9       **2. Claim Two**

10       Claim two of the Petition alleges that Petitioner was denied his due process rights, because the  
11 trial court excluded part of the testimony of defense expert witness, Dr. Constance Dalenberg. (Pet. 16.)  
12 According to Petitioner, the trial court limited Dr. Dalenberg's testimony to an examination of studies in  
13 which she participated regarding factors that account for false accusations from children. Dr. Dalenberg,  
14 however, was not allowed to give an opinion about the credibility of E., the child witness. (Pet. 16-17.)

15       Prior to trial, the trial court granted defense counsel leave to call expert witness Dr. Constance  
16 Dalenberg on the issue of false reporting of sexual abuse by a child against a parent. (Lodgment 4, at  
17 59.) Defense counsel stated Dr. Dalenberg would testify regarding clinical studies showing a statistical  
18 increase in false reporting based on factors such as divorce, domestic violence, and retaliation for unduly  
19 strict discipline. (*Id.* at 57-58.) Defense counsel explained the evidence was relevant to the defense  
20 theory that Petitioner's wife and children wanted him out of the house, because he was abusive and  
21 tyrannical, and they saw a way of getting him out and retaliating against him by fabricating the claims  
22 that he had sexually abused E. (*Id.*)

23       During Dr. Dalenberg's trial testimony, problems emerged with the manner in which she was  
24 questioned and with the answers she presented. The prosecutor and the trial court were concerned that  
25 Dr. Dalenberg was in effect giving the jury her opinion that E. was lying about the sexual abuse.  
26 (Lodgment 10, at 1301.) The court called a recess during Dr. Dalenberg's testimony to discuss the  
27 matter with the parties. (*Id.*) After this discussion and out of the presence of the jury, the court  
28 admonished Dr. Dalenberg that she could give research information about factors associated with false

1 reporting, but she should not give her opinion about the value of the evidence or the credibility of  
2 witnesses in this particular case. (*Id.* at 1307-11.) Dr. Dalenberg resumed her testimony with no further  
3 admissibility problems.

4       Thereafter, the court reviewed Dr. Dalenberg's testimony that had been presented to the jury  
5 prior to the recess, and concluded that portions of her testimony constituted an improper opinion on E.'s  
6 credibility. (Lodgment 12, at 1820-26.) The trial court struck the portions of Dr. Dalenberg's testimony  
7 where she stated she reviewed the reports for E.'s case and where she specifically referred to E.'s  
8 statements or testimony. (*Id.* at 1824-25.) The court advised counsel that in their arguments to the jury,  
9 they could not refer to these stricken aspects of the expert's testimony, although they were free to argue  
10 about how the factors identified by the expert applied to the jury's credibility determination. (*Id.* at  
11 1825-26.)

12       Petitioner contends the trial court's ruling excluding parts of Dr. Dalenberg's testimony was an  
13 abuse of discretion that violated his due process right to present a defense. The last reasoned state court  
14 opinion that addresses this issue is the state appellate court decision of June 21, 2007. (Lodgment 22.)  
15 That court found that the trial court did not abuse its discretion in concluding that portions of Dr.  
16 Dalenberg's statements addressing E.'s specific case concerned matters of credibility that could be  
17 resolved by the jury without expert assistance. (*Id.* at 20.) This Court finds the state appellate court  
18 ruling was neither contrary to, nor an unreasonable application, of clearly established U.S. Supreme  
19 Court law.

20       As explained above, a federal writ of habeas corpus is not available for alleged error in the  
21 interpretation or application of state law. Absent some federal constitutional violation, a violation of  
22 state law does not provide a basis for habeas relief. *Estelle*, 502 U.S. at 67-68. Accordingly, a state  
23 court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the  
24 state proceedings so fundamentally unfair as to violate due process. *Drayden v. White*, 232 F.3d 704,  
25 710 (9th Cir. 2000); *Spivey v. Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999); *Jammal*, 926 F.2d at 919. In  
26 order to raise such a claim in a federal habeas corpus petition, the "error alleged must have resulted in a  
27 complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962); *Crisafi v. Oliver*, 396  
28 F.2d 293, 294-95 (9th Cir. 1968); *Chavez v. Dickson*, 280 F.2d 727, 736 (9th Cir. 1960).

1 Here, the trial court did not strike all of Dr. Dalenberg's statements. The portions of Dr.  
2 Dalenberg's testimony that were admitted without admissibility problems included the following: Dr.  
3 Dalenberg testified that research on child sexual abuse revealed that about 3 to 8 percent of accusations  
4 in cases not involving a child custody dispute are false, and about 15 percent are false when there is a  
5 child custody or other type of dispute between the parents. (Lodgment 10, at 1292.) Dr. Dalenberg  
6 explained that false reporting can arise from such factors as disassociation (memory disruptions in an  
7 abused child); a child's suggestibility; a child's reality testing problems (*i.e.*, hallucinations or hearing  
8 voices); the use of leading questions during an interview with a child; and parental conduct of modeling  
9 extreme accusations and lying. (*Id.* at 1293-96.) She testified that disassociation is evidenced when a  
10 child presents contradictory accounts within a short period of time without noticing the contradictions,  
11 and suggestibility is demonstrated when a child attempts to answer questions in a manner that  
12 corresponds with what the examiner is trying to elicit from the child. (*Id.* at 1294.) Additional factors  
13 indicative of false reporting include a child's history of defiance (*i.e.*, "acting out" against authority) and  
14 a family motive for a particular outcome. (*Id.* at 1300, 1315.)

15 The trial court struck portions of Dr. Dalenberg's testimony where she specifically referred to  
16 E.'s statements or testimony. (*Id.* at 1824-25.) As the trial court stated he permitted defense counsel to  
17 call Dr. Dalenberg to testify about factors that tend to suggest certain percentages of child sexual abuse  
18 claims may or may not be reliable. (*Id.* at 1303.) However, the expert witness was not permitted to  
19 testify to the credibility of the particular witness in the case. (*Id.*) Credibility determinations are left up  
20 to the jury. (Lodgment 1, at 87.) The trial court's ruling was reasonable. A large portion of Dr.  
21 Dalenberg's testimony about false reporting remained on the record, and Petitioner was still able to  
22 present the information as part of his defense. Petitioner fails to show how the trial court's ruling  
23 rendered his trial fundamentally unfair and denied him due process.

24 Accordingly, the state court's denial of this claim was neither contrary to, nor an unreasonable  
25 application of, clearly established U.S. Supreme Court law. As such, this Court **RECOMMENDS** that  
26 claim two be **DENIED**.

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1 **IV. CONCLUSION**

2 After thorough review of the record in this matter and based upon the above discussion, this  
3 Court **RECOMMENDS** that the Petition for Writ of Habeas Corpus be **DENIED** and this action be  
4 **DISMISSED WITH PREJUDICE**. This report and recommendation of the undersigned Magistrate  
5 Judge is submitted to the United States District Judge assigned to this case pursuant to 28 U.S.C. §  
6 636(b)(1).

7 **IT IS ORDERED** that no later than **October 23, 2008**, any party to this action may file written  
8 objections with the Court and serve a copy on all parties. The document should be captioned  
9 “Objections to Report and Recommendation.”

10 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court and  
11 served on all parties no later than **ten days after being served with the objections**. The parties are  
12 advised that failure to file objections within the specified time may waive the right to raise those  
13 objections on appeal of the Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14 DATED: September 22, 2008

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16 **CATHY ANN BENCIVENGO**  
17 United States Magistrate Judge  
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